QUESTIONS PRESENTED

1. Did the Court of Appeals err in applying the rule of *Montana v. United States*, 450 U.S. 544 (1981), that the inherent sovereign civil regulatory jurisdiction of Indian tribes over the activities of non-Indians has been generally divested as to lands alienated from Indian title by Congress, to a question of tribal adjudicatory jurisdiction over a civil tort action between two non-Indians arising on a state highway crossing Indian trust land within an Indian reservation, rather than applying the rule of *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), that Tribes have retained their civil jurisdiction over non-Indian conduct on Indian land unless that jurisdiction has been expressly limited by Congress?

2. Assuming *arguendo* that the *Montana* rule applies, does the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation nevertheless have civil jurisdiction over a personal injury claim brought by a non-Indian resident of the Reservation with strong ties to the Tribe, against a non-Indian contractor that had a subcontract with the Tribe's corporation to perform work on the Reservation, to recover for damages suffered in an automobile accident on a state highway on a federal right-of-way crossing Indian trust land on the Reservation?

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OPINIONS BELOW

The *en banc* judgment and opinion and dissenting opinion of the Court of Appeals for the Eighth Circuit, entered February 16, 1996, are reported at 76 F.3d 930, and reprinted in the Joint Appendix, J.A. 91-138. The order of the Court of Appeals granting rehearing *en banc* entered on January 9, 1995 is reprinted in the Appendix to the Petition for *Certiorari* at page 49. The opinion and dissenting opinion of the three judge panel of the Court of Appeals, entered November 29, 1994 and vacated by the granting of rehearing *en banc*, are reprinted at J.A. 68-90. The District Court's memorandum and order, entered September 16, 1992, are unpublished and reprinted at J.A. 54-67. The memorandum opinion of the Northern Plains Intertribal Court of Appeals, dated January 8, 1992 is unpublished and reprinted at J.A. 26-37. The opinion and order of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, filed on September 4, 1991, is unpublished and reprinted at J.A. 19-25.

JURISDICTION

Rehearing *en banc* by the Court of Appeals for the Eighth Circuit was granted by order of January 9, 1995. The *en banc* judgment and opinion and dissenting opinion of the Court of Appeals were entered on February 16, 1996. A petition for a writ of *certiorari* was filed with this Court on May 16, 1996, within 90 days of February 16, 1996. This Court granted the petition by order dated October 1, 1996.

This Court has jurisdiction to review the final *en banc* judgment of the Court of Appeals for the Eighth Circuit under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are set out verbatim as follows:

A. 25 U.S.C. § 323. Rights-of-way for all purposes across any Indian lands:

The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

B. 18 U.S.C. § 1151. Indian country defined:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian Country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

STATEMENT OF THE CASE

A. Introduction

The Three Affiliated Tribes (Mandan, Hidatsa, and Arikara) of the Fort Berthold Indian Reservation are a federally-recognized Indian tribe (the Tribe) which exercises its sovereignty under a constitution adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479, and approved by the Secretary of the Interior. The Tribe is located on the Fort Berthold Indian Reservation (the Reservation) in west central North Dakota pursuant to the Treaty of Fort Laramie of Sept. 17, 1851, 11 Stat. 749, with the United States. The population of the Reservation includes 2,999 enrolled tribal members and 2,458 nonmembers, of whom

2,396 are non-Indians. United States Department of Commerce, Bureau of the Census, 1990 Census of Population.

Pursuant to its Constitution, the Tribe has established a Tribal Court as the judicial branch of its government. Const. and By-Laws of the Three Affiliated Tribes, Art. IV, Sec. 3. The Tribal Court is funded primarily under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n, and is supplemented by tribal funds. The Tribal Court operates pursuant to a written code of laws adopted by the Tribe and approved by the Secretary of the Interior. Code of Laws of the Three Affiliated Tribes, Chap. 1, Secs. 1-3.6 (Tribal Business Council Resolution 82-192, Oct. 22, 1982). Appeals may be taken from the Tribal Court to the Northern Plains Intertribal Court of Appeals, which also receives federal funding under the Indian Self-Determination and Education Assistance Act. *See Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1416 n.7 (8th Cir. 1996).

On November 9, 1990, there was a two-vehicle accident on North Dakota Highway 8 within the exterior boundaries of the Reservation near the small community of Twin Buttes. Highway 8 enters the southern boundary of the Reservation several miles south of Twin Buttes. The authority for Highway 8 to enter the Reservation is an easement granted by the Bureau of Indian Affairs to the North Dakota Highway Department on May 8, 1970 pursuant to 25 U.S.C. §§ 323-328, Act of Feb. 5, 1948, 62 Stat. 17. On the Reservation, Highway 8 crosses 6.59 miles of Indian trust land before it ends at the shores of Lake Sakakawea. Highway 8 does not cross any non-trust land within the Reservation.

The drivers of the vehicles in the accident, Gisela Fredericks and Lyle Stockert, are both non-Indians. Gisela Fredericks is a long-time Reservation resident, the widow of tribal member Kenneth Fredericks, and the mother of five adult children who are tribal members. Lyle Stockert is an employee and part owner of A-1 Contractors, a non-Indian subcontracting company located off the Reservation. Gisela Fredericks was seriously injured in the accident and was hospitalized for twenty-four days.

At the time of the accident, Lyle Stockert was driving a company gravel truck. A-1 Contractors previously had entered into a $12,490 subcontract on the Reservation with LCM Corporation, an entity wholly owned by the Tribe. Under the subcontract, A-1 Contractors did excavating, berming, and recompacting in connection with the construction of the Twin Buttes tribal community center. All of A-1 Contractors' work under the subcontract was performed within the boundaries of the Reservation.

B. Proceedings in the Tribal Courts and in the Federal District Court

Mrs. Fredericks and her five adult children (hereinafter collectively referred to as "the Fredericks"), sued Lyle Stockert and A-1 Contractors (hereinafter collectively referred to as "A-1")[1] in Tribal Court for damages for injuries allegedly sustained in the accident as a result of their negligence. Mrs. Fredericks sought $1,000,000 for her personal injuries and medical expenses. Her children sought $1,000,000 for loss of consortium (J.A. 5-10).

A-1 moved to dismiss the action for lack of jurisdiction under federal law (J.A. 11-18). The Tribal Court held that it had jurisdiction under federal law over Mrs. Fredericks' action.[2] The Northern Plains Intertribal Court of Appeals affirmed and remanded the case to the Tribal Court for further proceedings (J.A. 26-37). No further proceedings have occurred against A-1 in this case in Tribal Court since the remand.

Under 28 U.S.C. § 1331, A-1 sought declaratory and injunctive relief from tribal jurisdiction in the federal district

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[1] Also named, but later dismissed, was Continental Western Insurance Company, A-1's insurer on the subcontract activities (J.A. 38-40). A punitive damages claim was dismissed when the insurance company was dismissed.

[2] The Tribal Court expressly declined to reach or express any opinion as to its jurisdiction over the consortium claims by Mrs. Fredericks' children (J.A. 25). No other court has reached this issue in this litigation.

court for North Dakota (J.A. 41-45). In addition to the Fredericks, the Tribal Court and the Tribal Court Judge (hereinafter collectively referred to as "the Tribal Defendants") were named as defendants (J.A. 41-42). The Tribal Defendants waived their immunity and consented to suit for the limited purpose of defending the federal law claims against tribal jurisdiction in this case (J.A. 46-53).

On cross-motions for summary judgment, the Honorable Patrick A. Conmy denied A-1's motion and granted the Fredericks' and Tribal Defendants' motions (J.A. 54-67). The district court based its decision largely on this Court's decision in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

C. Proceedings in the United States Court of Appeals for the Eighth Circuit

1. The Three Judge Panel

A-1 appealed to the Court of Appeals for the Eighth Circuit.[3] A three-judge panel ruled 2-1 in favor of tribal court jurisdiction over Mrs. Fredericks' action (J.A. 68-90). The majority opinion was authored by Judge McMillian and joined by Judge Floyd R. Gibson. The majority upheld tribal court jurisdiction under this Court's decision in *Iowa Mutual Ins. Co. v. LaPlante*, and, alternatively, under this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981). (J.A. 69-81). Judge Hansen dissented, on the grounds that *Iowa Mutual Ins. Co. v. LaPlante* is inapplicable to this case, and that tribal jurisdiction in the case is unsustainable under *Montana v. United States* (J.A. 81-90).

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[3] The issue of personal jurisdiction of the Tribal Court over A-1 was raised in and reached by the Tribal Court (J.A. 24), the Tribal Court of Appeals (J.A. 27), and the federal district court (J.A. 63). All of these courts found that the Tribal Court has personal jurisdiction over A-1. Before the Court of Appeals, A-1 raised only the issue of subject matter, not personal, jurisdiction (J.A. 92).

2. The *En Banc* Court

The *en banc* Court of Appeals ruled 8-4 against tribal court subject matter jurisdiction over Mrs. Fredericks' action (J.A. 91-138). Judge Hansen authored the majority opinion which was joined by Chief Judge Richard S. Arnold, and Judges Fagg, Bowman, Wollman, Magill, Loken, and Morris Shepard Arnold. The majority thought that *Iowa Mutual Ins. Co. v. LaPlante* is inapplicable to this case, and that tribal jurisdiction in the case is unsustainable under *Montana v. United States* (J.A. 91-114). Judges McMillian, Floyd R. Gibson, Beam, and Murphy dissented. Judge Beam wrote a concurring and dissenting opinion, in which he stated that he would uphold tribal jurisdiction in this case under *Montana v. United States*, (J.A. 114-121). Judges Gibson and McMillian wrote dissenting opinions, arguing that tribal jurisdiction should be upheld under both *Iowa Mutual Ins. Co. v. LaPlante* and *Montana v. United States* (J.A. 121-138). All four dissenting Judges joined each of the dissenting opinions.

The Tribe's and the Fredericks' Petition for a Writ of *Certiorari* to this Court followed on May 16, 1996.

SUMMARY OF ARGUMENT

I. The fundamental principle of Indian tribal sovereignty is that it is inherent. While it is subject to divestment by Congress, it continues unless and until it has been divested. A Tribe's sovereignty extends over its members and over its territory. Within its territory, a tribe's sovereignty encompasses the conduct of non-Indians as this Court has recognized in a variety of contexts. *E.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (taxation of oil and gas severance); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (regulation of hunting and fishing); *Williams v. Lee*, 358 U.S. 217 (1959) (civil tribal court cases brought by non-Indians against Indians); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (civil tribal court cases brought by Indians against non-Indians); *accord Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

This general rule is dispositive of this case. In those cases which have found against tribal civil jurisdiction over non-Indian activities, the Court has done so, consistent with the doctrine of inherent sovereignty, only after finding a congressional divestment of tribal sovereignty through the alienation of Indian land to non-Indians. *E.g., Montana v. United States*, 450 U.S. 544 (1981) (General Allotment Act); *Brendale v. Confederated Tribes and Bands*, 498 U.S. 408 (1989) (General Allotment Act); *South Dakota v. Bourland*, 508 U.S. 679 (1993) (Flood Control Project Acts).

The title to the land on which this case arose has not been alienated to non-Indians. Although the state maintains a highway over the land pursuant to an easement, the land remains Indian trust land. *See Burlington Northern R.R. Co. v. Blackfeet Tribe*, 904 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992) (absent express congressional provision otherwise, tribe retains beneficial title to land underlying railroad right-of-way).

But even if the easement affects the highway's status as Indian land, in the area of adjudicatory jurisdiction that does not amount to a congressional divestment of tribal sovereignty over non-Indian conduct. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (in a tribal court case arising on non-Indian fee land, the Court holds that tribal jurisdiction is not automatically foreclosed); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (in a tribal court case arising on a federal highway, the Court holds that tribal jurisdiction is presumptive). There are good reasons this is so. Adjudicatory jurisdiction is less intrusive than regulatory jurisdiction. In addition, adjudicatory jurisdiction can be concurrent with another sovereign whereas dual regulatory jurisdiction may create an unreconcilable conflict.

The proposition that a Tribe's court may hear a civil action involving two non-Indians when one of the non-Indians chooses to bring the case in tribal court is unremarkable. *Williams v. Lee*, 358 U.S. 217 (1959), makes clear that there is nothing inherently offensive about forcing non-Indians involved in civil disputes on Indian land to appear in tribal court. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978),

states that tribal courts are recognized as the fora for resolving reservation-based civil disputes involving non-Indians. *National Farmers* and *Iowa Mutual* show that tribal court jurisdiction over non-Indian defendants in the civil area, as opposed to the criminal area, *see Oliphant v. Suquamish Tribe*, 438 U.S. 191 (1978), is not inconsistent with overriding national interests.

II. Alternatively, assuming arguendo that the Tribe must meet the *Montana* "tribal interest test" to have jurisdiction over this case, the Tribe can show either a consensual relationship or a threat or effect on the Tribe sufficient to meet that test.

Regarding the consensual relationship, A-1 Contractors and its employee were on the Reservation pursuant to a subcontract with the Tribe's corporation to help build a tribal community center. *Montana* does not limit tribal jurisdiction to the "four corners" of the construction subcontract. Rather, consensual relationship jurisdiction under *Montana* encompasses reasonably foreseeable consequences of the subcontract, such as an injury accident involving the company gravel truck.

In addition, A-1's tortious conduct against a member of the Reservation community threatens the Tribe economically with respect to provision of services to injured community members and their families on the Reservation. Tortious conduct on the Reservation also threatens the Tribe politically with respect to determination of tort law on the Reservation.

ARGUMENT

I. THE TRIBE'S INHERENT SOVEREIGNTY GIVES IT JURISDICTION OVER THIS CIVIL COURT ACTION ARISING BETWEEN TWO NON-INDIANS ON INDIAN LAND

A. The Tribe retains sovereignty over conduct occurring within its territory unless divested of such authority by Congress

The fundamental principle of federal Indian law is that the sovereignty of Indian tribes is inherent and exists unless and until it has been divested by Congress.

> The powers of Indian tribes are, in general, "*inherent powers of a limited sovereignty which has never been extinguished.*" F. Cohen, Handbook of Federal Indian Law 122 (1945) (emphasis in original). Before the coming of the Europeans, the tribes were self-governing sovereign political communities. . . . . The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.

United States v. Wheeler, 435 U.S. 313, 322-23 (1978); *accord Williams v. Lee*, 358 U.S. 217, 223 (1959) ("If this power is to be taken away from them, it is for Congress to do it"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) ("a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent").[4]

Absent congressional divestment, a tribe's inherent sovereignty extends to both its members and its territory. "We

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[4] "This Court has found implicit divestiture of inherent sovereignty necessary only "where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when [1] the tribes seek to engage in foreign relations, [2] alienate their lands to non-Indians without federal consent, or [3] prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights." " *South Dakota v. Bourland*, 508 U.S. 679, 699 (1993) (Souter, J., dissenting), *citing Washington v. Confederated Tribes*, 447 U.S. 134, 153-154 (1980); *see also Duro v. Reina*, 495 U.S. 676 (1990) (tribes lack criminal jurisdiction over Indians who are members of another tribe); *cf. Rice v. Rehner*, 463 U.S. 713, 726 (1983) (liquor regulation).

The present case, of course, involves tribal civil court jurisdiction, an area in which divestment must be congressional. *E.g., Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) ("In the absence of any indication that Congress intended . . . to limit the jurisdiction of the tribal courts, we decline petitioner's invitation to hold that tribal sovereignty can be impaired in this fashion").

have repeatedly recognized the Federal Government's long-standing policy of encouraging tribal self-government. This policy reflects the fact that Indian tribes retain "attributes of sovereignty over both their members and their territory," to the extent that sovereignty has not been withdrawn by federal statute or treaty." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (*Iowa Mutual*) (citations omitted).

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (*Merrion*), the seminal case on tribal taxation of non-Indian activities within a reservation, the Court concluded that:

> "Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations.' " They "are unique aggregations possessing attributes of sovereignty over both their members and their territory."
>
> . . . . [T]he Tribe's authority to tax non-Indians who conduct business on the reservation does not simply derive from the Tribe's power to exclude such persons, but is an inherent power necessary to tribal self-government and territorial management.

455 U.S. at 140-41 (citations omitted).

In upholding tribal court jurisdiction over a contract action that arose between a tribal member and a non-Indian on a reservation, the Court stated:

> It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

Williams v. Lee, 358 U.S. at 223 (citations omitted).

Largely due to now-discredited federal policies of the late nineteenth century such as allotment and sale of "surplus" Indian land, many Indian reservations have not remained closed territories. During the allotment era, acts of Congress opened these reservations to homesteaders and in some instances patented in fee simple substantial acreage within reservations to non-Indians. *See generally* Felix S. Cohen, *Handbook of Federal Indian Law*, 127-143 (1982 ed.).

Some of this land today remains owned by non-Indians. This Court takes into account the effects of the allotment scheme on tribal sovereignty and tribal territorial jurisdiction. *See Montana v. United States*, 450 U.S. 544, 561 (1981) (*Montana*) ("treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands" by Congress).

Despite the acts which opened up reservations and alienated land within them, "[t]he Court has repeatedly emphasized that there is a significant geographic component to tribal sovereignty. . . . " *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980); *see also* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 Colum. L. Rev. 809, 837 (1996) ("the historical presumption on which the doctrine of inherent sovereignty rest[s] . . . [is] that tribes have territorial sovereignty unless limited by treaty or acts of Congress").

B. *Williams v. Lee, Merrion, National Farmers Union*, and *Iowa Mutual* establish that Congress has not generally divested tribal civil jurisdiction over the conduct of non-Indians on Indian land[5]

Williams v. Lee, the landmark case upholding tribal civil jurisdiction over non-Indians on Indian land, was a lawsuit brought in state court by a non-Indian against a tribal member to collect a debt incurred on a reservation. 358 U.S. at 217-218. This Court recognized that Congress has not generally granted civil jurisdiction to the states over court cases involving non-Indians on Indian land. *Id.* at 218-222. The

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[5] In this Brief, the term "Indian land" refers to land in which the Tribe or tribal members have an interest. It does not include land owned in fee by non-Indians or other land alienated from Indian title by Congress. *See* 18 U.S.C. § 1151, as construed by this Court in accordance with other federal statutes, *e.g.*, *Montana*, 450 U.S. at 557-566 (General Allotment Act, 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381, generally divests tribal jurisdiction to regulate non-Indian activities on non-Indian fee land within a reservation).

Court noted that Public Law 280, 25 U.S.C. § 1322, provides for limited state court jurisdiction over civil actions in Indian country, but Arizona had not taken advantage of that provision. 358 U.S. at 222-223. Since Congress had neither granted state jurisdiction nor divested tribal jurisdiction, the Court held that inherent and exclusive jurisdiction is in the tribal courts. *Id.* at 223; *cf. New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (in challenge to state's authority to regulate the hunting and fishing of non-Indians on Indian land, Court holds that jurisdiction to regulate hunting and fishing by non-Indians on Indian land is exclusive with the tribe).

Williams v. Lee laid the foundation for a clear rule that tribes retain their inherent civil jurisdiction over the conduct of non-Indians on Indian land unless such jurisdiction has been expressly divested by Congress. Subsequent cases have sustained inherent tribal jurisdiction over non-Indian conduct on Indian land against arguments that a particular federal statute has divested tribal jurisdiction.

In *Merrion*, provisions of the Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396g, and other federal energy legislation were alleged to have divested a tribe's inherent sovereignty to impose a severance tax on oil and gas development activities conducted by non-Indians on Indian land. 455 U.S. at 149-152. The Court disagreed that these statutes were "clear indications" of divestment and upheld the tribe's right to tax. *Id.* at 152;[6] *cf. Washington v. Confederated Tribes*, 447 U.S. 134, 152 (1980) (tribes can tax cigarette purchases by nonmembers on Indian land because "federal law to date has not worked a divestiture of Indian taxing power").

National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985) (*National Farmers*), presented a non-statutory challenge to the civil jurisdiction of a tribal court. In

[6] The Court in *Merrion* explicitly based tribal taxing power not on the consent of the taxpayer, but on "the tribe's general authority, as sovereign, to control economic activity . . . and to defray the cost of providing governmental services . . . " 455 U.S. at 137, 147.

arguing against tribal court jurisdiction to hear a reservation-based tort claim against non-Indians, the non-Indians in *National Farmers* urged the Court to extend to civil cases the rule of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that tribal criminal powers over non-Indians have been generally and implicitly divested. The Court refused to do so.

> In *Oliphant* we . . . concluded that federal legislation conferring jurisdiction on the federal courts to try non-Indians for offenses committed in Indian Country had implicitly preempted tribal jurisdiction.
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> . . . . For several reasons, however, the reasoning of *Oliphant* does not apply to this case
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> . . . . [W]e conclude that the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require.

471 U.S. at 853-856.

In *Iowa Mutual*, the Court rejected the argument that the federal diversity jurisdiction statute, 28 U.S.C. § 1332, divested tribal authority to adjudicate a civil tort case arising on a reservation and involving a non-Indian defendant.

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact."

480 U.S. at 18 (citations omitted).

The district court in this case thus correctly held that "[t]he law is clear that Tribal Courts have civil jurisdiction over non-Indians unless specifically limited by treaty or federal statute. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987)." (J.A. 63); *accord Hinshaw v. Mahler*, 42 F.3d 1178,

1181 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 485 (1994) (upholding tribal court jurisdiction over tort claims brought by a tribal member against a non-Indian and arising out of an automobile accident on a federal highway running through an Indian reservation, because "[t]he Tribes' jurisdiction has not been limited by treaty or statute . . . "); *but cf. Yellowstone County v. Pease*, 96 F.3d 1169, 1175-1176 (9th Cir. 1996) (explaining *Hinshaw* as being decided under the *Montana* rule, not the *Iowa Mutual* rule).

The Court's treatment of tribal civil jurisdiction is vastly different than its treatment of tribal criminal jurisdiction.[7] In *Oliphant* the Court expressed grave concerns about the tremendous potential infringement on personal liberty posed by criminal jurisdiction. 435 U.S. at 210-212. The same concerns led the Court in *Duro v. Reina*, 495 U.S. 676 (1990), to prohibit Indian tribes from trying and punishing Indians who are members of another tribe. 495 U.S. at 693-94.[8]

Williams v. Lee, however, makes clear that there is nothing inherently offensive about forcing non-Indians to appear in tribal court civil actions. 358 U.S. at 223. A unanimous Court in *National Farmers* rejected a general divestment rule for tribal civil court jurisdiction, 471 U.S. at 853-856. "Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, their civil jurisdiction is not similarly restricted." *Iowa Mutual*, 480 U.S. at 15.

> [O]ur decisions recognize broader retained tribal powers outside the criminal context. Tribal courts,

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[7] Congress likewise has placed greater restrictions on tribal authority in criminal cases than in civil cases. The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303, confers habeas corpus jurisdiction on federal courts to review tribal incarcerations alleged to violate that Act, while the Act leaves tribal courts free from federal court review of civil cases. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 61-72.

[8] *Duro* has since been overturned by Congress to clarify that tribes may exercise some criminal jurisdiction over members of other tribes. 25 U.S.C. § 1301(2)-(4), Pub L. 101-511, Nov. 5, 1990, 104 Stat. 1893.

> for example, resolve civil disputes involving nonmembers, including non-Indians. . . . "The development of principles governing civil jurisdiction in Indian country has been markedly different from the development of rules dealing with criminal jurisdiction."

Duro v. Reina, 495 U.S. at 687-88, citing Felix S. Cohen, *Handbook of Federal Indian Law* 253 (1982 ed.). Clearly, the criminal cases do not alter the rule, hereinafter referred to as "the *Iowa Mutual* rule," that, absent divestment by Congress, tribes retain inherent civil jurisdiction over the conduct of non-Indians on Indian land.

C. *Montana, Brendale,* and *Bourland* are consistent with a finding of tribal jurisdiction in this case because those cases involved congressional divestment of tribal jurisdiction

Tribal jurisdiction in this case is consistent with *Montana* and its progeny, *Brendale v. Confederated Tribes and Bands*, 492 U.S. 408 (1989) (*Brendale*), and *South Dakota v. Bourland*, 508 U.S. 679 (1993) (*Bourland*). A-1 misreads these cases as creating a general rule of divestiture regarding tribal civil jurisdiction over non-Indian conduct anywhere on Indian reservations. In effect, A-1 argues that these cases overrule the *Iowa Mutual* rule cases. But there has been no such overruling, and a proper reading shows that *Montana, Brendale*, and *Bourland* turned on this Court's findings that relevant acts of Congress diminished the tribal civil regulatory jurisdiction over non-Indian activities on the non-Indian land involved in those cases.

For example, the tribal jurisdictional issue in *Montana* was regulation of hunting and fishing by non-Indians within a reservation. 450 U.S. at 557-566. At the outset the Court specifically separated the issue of the tribe's authority to regulate the activities of non-Indians on Indian land from the issue of tribal authority to regulate such activities on land owned in fee by non-Indians.

> The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land

> belonging to the Tribe or held by the United States in trust for the Tribe, and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits. What remains is the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe.

450 U.S. at 557 (citations omitted).

The court of appeals in *Montana* had held that "the right of Indians to control hunting, trapping and fishing on their lands" through civil regulation was an inherent sovereign right confirmed in the tribe's treaties and undiminished by Congress. *United States v. Montana*, 604 F.2d 1162, 1166-1167 (9th Cir. 1979), *citing United States v. Finch*, 548 F.2d 822 (9th Cir. 1976), vacated on other grounds, 433 U.S. 676 (1977). This Court "readily agreed" with this holding. 450 U.S. at 557; *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 344 (tribal authority to regulate non-Indian hunting and fishing on Indian land is exclusive of state authority).

On the separate issue in *Montana* of "the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe," this Court reversed the court of appeals. 450 U.S. at 557. The Court found that neither the tribe's inherent sovereignty nor its treaties supported tribal regulation of non-Indian hunting and fishing on the non-Indians' fee land in that case. *Id.* at 557-67. The Court determined that the General Allotment Act, 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381, effectuated a divestment of tribal sovereignty to regulate non-Indian hunting and fishing on land alienated to non-Indians. 450 U.S. at 559-560.

It is in this portion of *Montana* dealing with "lands no longer owned by the tribe," 450 U.S. at 564, that the Court articulates a rule, hereinafter referred to as "the *Montana* rule," that where Congress has alienated land from Indian

title, tribal jurisdiction to regulate the activities of non-Indians on such land remains only where the *Montana* "tribal interest test" is met. *Montana*, 450 U.S. at 565-566; *see also infra*, Part II of this Brief (discussing the tribal interest test). Subsequent cases of this Court clarify that application of the *Montana* rule turns on whether the activities sought to be regulated take place on Indian land or on non-Indian land.

For example, one term after *Montana*, the Court in *Merrion* upheld tribal taxation of non-Indian activities conducted on Indian land without reference to the *Montana* rule. "The Tribe has the inherent power to impose the severance tax on petitioners. . . . Because Congress may limit tribal sovereignty, we now review petitioners' argument that Congress, when it enacted two federal Acts governing Indians and various pieces of federal energy legislation, deprived the Tribe of its authority to impose the severance tax." 455 U.S. at 149. As discussed above, the Court found no divestment and thus upheld tribal jurisdiction. *Id.* at 149-152.

In *New Mexico v. Mescalero Apache Tribe*, the state relied on *Montana* for its claimed jurisdiction to regulate hunting and fishing of non-Indians on Indian land. The Court made quite clear the *Montana* rule's land basis.

> Our decision in *Montana v. United States*, *supra*, does not resolve this question. Unlike this case, *Montana* concerned lands located within the reservation, but *not* owned by the Tribe or its members. We held that the Crow Tribe could not as a general matter regulate hunting and fishing on those lands. But as to "land belonging to the Tribe or held by the United States in trust for the Tribe," we "readily agree[d]" that a Tribe may "prohibit nonmembers from hunting or fishing . . . [or] condition their entry by charging a fee or establish bag and creel limits."

462 U.S. at 330-331 (alterations in original; citations and footnote omitted).

The issue in *Brendale* was zoning of lands within a reservation but owned in fee by non-Indians. 492 U.S. at

417-418, 428. The plurality in *Brendale* begins by stating that:

> We analyzed the effect of the Allotment Act on an Indian tribe's treaty rights to regulate activities of nonmembers on fee land in *Montana v. United States*. . . . In *Montana*, as in the present cases, the lands at issue had been alienated under the Allotment Act, and the Court concluded that "[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when the avowed purpose of the allotment policy was the ultimate destruction of tribal government."

Id. at 423 (alteration in original; citations omitted).

The plurality in *Brendale* went on to distinguish the *Iowa Mutual* rule cases such as *Merrion* and *Washington v. Confederated Tribes* by stating that they "did not involve the regulation of fee lands, as did *Montana*." 492 U.S. at 427; *accord U.S. ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 906 (9th Cir. 1994) ("Strictly speaking, the *Montana* exceptions are relevant only after the court concludes that there has been a general divestiture of tribal authority over non-Indians by alienation of the land").

In *Bourland*, the Court determined that "[o]ur reading of the relevant statutes persuades us that Congress has abrogated the Tribe's rights under the Fort Laramie Treaty to regulate hunting and fishing by non-Indians in the area taken for the Oahe Dam and Reservoir Project." 508 U.S. at 687. The relevant statutes were the Flood Control Act of 1944, 58 Stat. 887, and the Cheyenne River Act of Sept. 3, 1954, 68 Stat. 1191. 508 U.S. at 683-684. The Court in *Bourland* equated the effect of these statutes with that of the General Allotment Act. As in *Montana* and *Brendale*, the Court found that the statutes in *Bourland* showed congressional intent to divest the tribe's right to regulate the activities of non-Indians on land which was no longer Indian land. *Id.* at 688-694.

Once it is realized that the *Montana* rule's application is limited to instances where Congress has alienated land from Indian title, it follows that the *Montana* rule is consistent with

the *Iowa Mutual* rule presuming tribal jurisdiction where the land involved continues to be Indian land.[9]

D. 25 U.S.C. § 323, under which the State was granted an easement to improve and maintain a highway across Indian trust land within the Reservation, does not divest the Tribe of its civil jurisdiction over the activities of non-Indians on the highway

1. Since the highway remains Indian land, the Tribe retains jurisdiction over non-Indian activities on the highway

It is undisputed that the injury accident underlying this case took place on North Dakota Highway 8 within the boundaries of the Tribe's Reservation. Highway 8 first entered the Reservation pursuant to a right-of-way granted by the Bureau of Indian Affairs to the North Dakota Highway Department on May 8, 1970, under 25 U.S.C. §§ 323-328, Act of Feb. 5, 1948, 62 Stat. 17, entitled "Rights-of-Way Across Indian Lands" (hereinafter the 1948 Act).

Within the Reservation, Highway 8 crosses 6.59 miles of land held in trust by the federal government for the Tribe and tribal members before it ends at the shores of Lake Sakakawea. Highway 8 does not cross any land owned in fee by non-Indians within the Reservation.

Section 323 of the 1948 Act provides that:

> The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian

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[9] Even where land has been alienated, a different result is called for in the less obtrusive area of adjudicatory jurisdiction. *See infra* at Section D, subsection 2 of this Part of this Brief.

> tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

25 U.S.C § 323.

Section 324 of the 1948 Act requires the consent of tribes and individual Indians to the granting of a right-of-way across their lands. 25 U.S.C. § 324.[10] Subsequent sections provide for payment and disposition of compensation to the Indian land owners; a savings clause for provisions of other federal statutes; applications for rights-of-way by federal agencies; and, agency administrative rule making authority. 25 U.S.C. §§ 325-328; *see also* 25 C.F.R. Part 169 (the 1948 Act's implementing regulations promulgated by the Bureau of Indian Affairs).

Nothing in the language of the 1948 Act expressly divests the Tribe of its civil jurisdiction over the conduct of non-Indians.[11] Under a strict application of the *Iowa Mutual* rule, that should end the inquiry and tribal jurisdiction in the present case should be upheld. "Congress has the power to abrogate Indians' treaty rights, though we usually insist that Congress clearly express its intent to do so." *Bourland*, 508 U.S. at 687 (citations omitted).

The Court in *Bourland* explains, however, that "what is relevant . . . is the effect of the land alienation . . . on Indian treaty rights tied to Indian use and occupation of reservation

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[10] This important provision distinguishes rights-of-way granted under the 1948 Act from rights-of-way granted under earlier statutes such as 25 U.S.C. § 311, Act of March 3, 1901, 31 Stat. 1083.

[11] The legislative history indicates that the purpose of the 1948 Act was primarily administrative. S. Rep. No. 823, 80th Congr., 2nd Sess. (1948), *reprinted in* U.S.C.C.S. 1033-1037. The 1948 Act was intended to address problems that had arisen due to scattered acts of Congress governing various kinds of rights-of-way on various types of Indian land. Under the 1948 Act, subject to Indian consent, the Secretary of the Interior would have "authority to grant rights-of-way of any nature over the Indian lands" described in the 1948 Act. *Id.* at 1036.

land." 508 U.S. at 692 *quoting Montana*, 450 U.S. at 559-560 n.9. The effect of the right- of-way here on the Tribe's right to use and occupy the right-of-way and the underlying land is quite different than the effects of the land alienation in *Montana* and *Bourland*.

Under the right-of-way in the present case, the State acquired an easement, which is a property right less than fee simple.[12] The easement is specifically to improve and maintain Highway 8. This easement likely also includes rights reasonably related to this specific right, such as, for example, the right to set vehicle weight limits on the highway. The easement is subject to substantial federal law and regulation. *United States v. Mitchell*, 463 U.S. 206, 223 (1983) (noting the comprehensive federal control over grants of rights-of-way effectuated under the 1948 Act); *see also* 25 C.F.R. Part 169.

The land underlying the right-of-way remains Indian trust land. *Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 902-904 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992) (absent congressional provision otherwise, Indians retain beneficial title to land underlying railroad right-of-way on reservation); *accord Davis v. Director, North Dakota Dep't of Transp.*, 467 N.W.2d 420, 422 (N.D. 1991)

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[12] *See* Grant of Easement for Right-of-Way from the Bureau of Indian Affairs to the North Dakota Highway Department (May 8, 1970), certified copy lodged spearately with the Court. An easement is a limited right to use property for a specific purpose. *See generally* Roger A. Cunningham, William B. Stoebuck, and Dale A. Whitman, *The Law of Property*, 436-437 (2d. ed. 1993). Uses reasonably related to the specific purpose are permitted where such uses do not interfere unreasonably with the underlying property, title to which remains with the landowner when an easement is granted. *Id.* at 459-461. When an easement terminates, the limited right of use granted to the easement holder reverts to the landowner. *Preseault v. I.C.C.*, 494 U.S. 1, 9 (1990). These property law principles generally apply to rights-of-way granted across Indian lands. *See, e.g., Mountain States Tel. and Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985) (utility company which received right-of-way from tribe holds an easement).

(within Indian reservations, state highways are "Indian country" within the meaning of 18 U.S.C. § 1151).

The Tribe exerts jurisdiction over the highway. The Tribe regulates traffic offenses on the Reservation, including the civil offense of abandoned vehicles by any person on any type of land within the Reservation. Code of Laws of the Three Affiliated Tribes, Chap. 4-A. The Tribe's Highway Ordinance regulates, *inter alia*, advertising signs and seasonal vehicle use on all highways on the Reservation. Code of Laws of the Three Affiliated Tribes, Chap. 28, Secs. 1.02, 1.10, 1.11 (Tribal Business Council Resolution 88-37-TL, Jan. 29, 1988).

Rights-of-ways such as Highway 8 are Indian land to which the *Iowa Mutual* rule applies. *See, e.g., Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d. at 904-905 (upholding, in the absence of congressional divestment, the tribes' right to tax non-Indian activities on railroad rights-of-way crossing Indian land within a reservation); *see also Hinshaw v. Mahler*, 42 F.3d at 1179-1180, (absent congressional divestment, upholding a tribal court's authority to hear tort claims brought by a tribal member against a non-Indian which arose on a federal highway running through a reservation); *but cf. Yellowstone County v. Pease*, 96 F.3d at 1175-1176 (explaining *Hinshaw* as a *Montana* rule case, not an *Iowa Mutual* rule case).

2. Even assuming *arguendo* that the right-of-way for Highway 8 takes the highway out of the category of Indian land, tribal adjudicatory jurisdiction remains

The Tribe maintains that the highway in the present case is Indian land. Assuming *arguendo*, however, that this Court should disagree, the Tribe's court may nevertheless hear Mrs. Fredericks' action.

a. The presumption of tribal civil adjudicatory jurisdiction applies even where Indian title has been alienated

This Court's cases show that, even on non-Indian land where Congress has limited tribal regulatory jurisdiction over non-Indian activities, tribal adjudicatory jurisdiction over civil actions against non-Indians remains.[13]

In *National Farmers* this Court refused to foreclose tribal court jurisdiction over a civil tort claim against non-Indians which arose on "[fee] land owned by the State [of Montana] within the boundaries of the Crow Indian Reservation." 471 U.S. at 847 & 853-856. Previously, in *Montana*, the Court had held that the Crow Tribe could not regulate the hunting and fishing of non-Indians on land owned in fee by the non-Indians within the Crow Reservation. 450 U.S. at 557-567.

In *Iowa Mutual*, the Court refused to find against tribal court jurisdiction over a civil tort claim against a non-Indian which arose on a federal highway within an Indian reservation. Brief for Petitioner at 2, *Iowa Mutual*, 480 U.S. 9; 480 U.S. at 16-19. But in *Bourland*, where the federal government had taken reservation land for a flood control project, this Court held that the tribe had lost its general right to regulate non-Indian activities on the taken land. 508 U.S. at 689.

This situation for tribes has parallels in federal preemption of state sovereignty. Congress may preempt or limit state regulation of an area while leaving adjudication of claims in that area to state courts. For example, state courts may hear claims brought under federal civil rights laws. *Allen v. McCurry*, 449 U.S. 90, 99-101 (1980). State and federal courts have concurrent jurisdiction to hear claims under the Federal Employees Liability Act, 45 U.S.C. § 56, which governs, *inter alia*, occupational injuries on railroad rights-of-way. Indeed, the general rule is that, unless Congress has

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[13] For a broader discussion of the difference between tribal regulatory and tribal adjudicatory jurisdictions, *see generally* Brief *Amici Curiae* of the Assiniboine and Sioux Tribes of the Fort Peck Reservation, *et al.*, in support of Petitioners in this case.

expressly preempted state adjudicatory jurisdiction as well as regulatory jurisdiction, state court jurisdiction remains. *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823-826 (1990) (to give federal courts exclusive jurisdiction over federal cause of action, Congress must affirmatively divest state courts of their presumptively concurrent jurisdiction).

The adjudicatory jurisdiction of one sovereign is not per se inconsistent with the regulatory power of another sovereign within the forum sovereign's territory. *See, e.g.*, 16 U.S.C. § 457 (personal injury and wrongful-death actions involving events occurring within a national park or other place subject to the exclusive [regulatory] jurisdiction of the United States, within the exterior boundaries of any state, shall be maintained as if the place were under the [adjudicatory] jurisdiction of the state), *cited in Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 480-481 (1981).

b. The existence of tribal court jurisdiction concurrent with the state courts does not pose the compliance problems of conflicting regulatory schemes

The present case presents no conflict between competing regulatory claims of a tribe and a state but rather a claim to tribal adjudicatory jurisdiction concurrent with the State of North Dakota.[14] In contrast, the *Montana* rule cases all involved competing and conflicting claims to regulatory jurisdiction. *Montana*, 450 U.S. at 564 n.13 (state and tribe sought competing jurisdiction over non-Indian hunting and fishing on non-Indian fee lands within a reservation); *Brendale*, 492 U.S. at 414 (tribe and county both claimed authority to zone fee lands owned by nonmembers of the tribe located within a reservation); *Bourland*, 508 U.S. at 685 (state and tribe regulated non-Indians in the "taken" land area of a reservation).

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[14] The district court below found that tribal court jurisdiction in this case is "not exclusive," presumably implying concurrent jurisdiction with the courts of North Dakota, J.A. 63-64.

The compliance problems inherent in conflicting non-taxation regulatory schemes, *e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 338 (individuals cannot comply with conflicting substantive hunting and fishing regulations emanating from two separate sovereigns), are not present in cases of adjudicatory jurisdiction. *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877 (1986) (state and tribe have concurrent jurisdiction over reservation-based civil court actions brought by tribes against non-Indians).[15]

Concurrent tribal jurisdiction over a civil action arising on a reservation is consistent with several aspects of North Dakota law, including the general rule of plaintiff's choice of forum, *see, e.g., Raaum v. Powers*, 396 N.W.2d 306 (N.D. 1986); the doctrine of forum non conveniens, *see, e.g., North Valley Water Ass'n v. Northern Improvement Co.*, 415 N.W.2d 492, 497 (N.D. 1987); and, the accordance of comity to the enforcement of tribal court judgements. *Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, Inc.*, 462 N.W.2d 164 (N.D. 1990); *accord* N.D. S.Ct. Rule 7.2.[16]

Moreover, the existence of a court's jurisdiction does not necessarily command the exercise of that jurisdiction in every case. *See Quackenbush v. Allstate Ins. Co.*, ___ U.S. ___, 116 S.Ct. 1712, 1720 (1996) (rule that federal courts have a virtually unflagging obligation to exercise their jurisdiction is not an absolute rule). Many doctrines and rules of law are available to litigants and courts to determine whether jurisdiction will in fact be exercised in a particular case. These

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[15] States and tribes may also have concurrent taxing jurisdiction over the activities of non-Indians on Indian land. *Washington v. Confederated Tribes*, 447 U.S. at 154-159 (cigarette purchases); *accord Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (oil and gas severance).

[16] For a broader discussion of tribal court full faith and credit law, *see generally* Brief *Amicus Curiae* of the Northern Plains Tribal Judges Association in support of Petitioners in this case.

include, *inter alia*, issues of personal jurisdiction;[17] forum non conveniens; choice of law; rules of decision;[18] comity; and, abstention.

Finally, tribal courts are cognizant of the rule that "federal law defines the outer boundaries of an Indian tribe's power over non-Indians . . . [and that] a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction." *National Farmers*, 471 U.S. at 851, 853.

II. ASSUMING *ARGUENDO* THAT THE *MONTANA* RULE APPLIES, THERE IS A CONSENSUAL RELATIONSHIP AND / OR A DIRECT EFFECT IN THIS CASE SUFFICIENT FOR THE TRIBE TO EXERCISE ADJUDICATORY JURISDICTION

The *Montana* rule is inapplicable to this case arising on Indian land and involving tribal adjudicatory jurisdiction. Even assuming, however, that the *Montana* rule applies, the Tribe has jurisdiction under that rule.

Montana teaches that inherent tribal jurisdiction over the activities of non-Indians on non-Indian fee land has not been

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[17] The Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, mandates that tribal governments accord, *inter alia*, due process and equal protection to those persons who are subject to tribal jurisdiction. *See Santa Clara Pueblo v. Martinez*, 436 U.S. at 56-58, 60-63; *see also* Code of Laws of the Three Affiliated Tribes, Chap. 1, Sec. 3.3 (personal jurisdiction).

[18] The Tribe's Code expressly permits the parties to stipulate to the application of state law in the absence of relevant tribal law. Code of Laws of the Three Affiliated Tribes, Chap. 1, Sec. 2.5(4); *see also Diamond Ring Trucking and Excavating v. Dawson*, Civ. No. 11-94-A04-461A (Ft. Berth. Tr. Ct. 1995) (tribal court looks to North Dakota law to determine appropriate standard of review for summary disposition and will recognize the affirmative defense of accord and satisfaction as it is interpreted by North Dakota law).

completely divested. 450 U.S. at 565-566.[19] Such jurisdiction may exist if the "tribal interest test" is met. *Id.* This test is as follows

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 565-566. (citations omitted).

Thus, a tribe has jurisdiction over non-Indians on non-Indian fee land where either: 1) there is a "consensual relationship" between the non-Indian and the tribe or a member of the tribe; or, 2) the tribe's political integrity, economic security, or health and welfare are threatened or directly affected. In this case both prongs of the test are met.

A. *Montana* contemplates that reasonably foreseeable acts stemming from a consensual relationship will be subject to tribal jurisdiction

It is undisputed that the $12,490 subcontract between A-1 and LCM, a corporation wholly-owned by the Tribe, is a "consensual relationship" entered into on the Reservation. It is also undisputed that in performing its subcontract, A-1

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[19] This is in contrast to tribal criminal jurisdiction over non-Indians, which has been completely divested and can only be restored by Congress. *Oliphant*, 435 U.S. at 211-212.

participated in the building of the Twin Buttes tribal community center on the Reservation. A-1 argues that this consensual relationship gives the Tribe jurisdiction only over disputes arising directly from the subcontract.

This view of the effect of a consensual relationship is too narrow. *Montana* holds that "Indian tribes retain inherent sovereign power . . . [to] . . . regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with a tribe or its members through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. Tribal jurisdiction is not limited to the "four corners" of a consensual relationship. *See FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314-1315 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991) (non-Indian company located on non-Indian fee land within a reservation is subject to tribal regulation of its employment practices because of the company's overall "substantial presence" on the reservation).

At a bare minimum, *Montana* recognizes tribal jurisdiction over the reasonably foreseeable consequences of a consensual relationship. *See FMC v. Shoshone-Bannock Tribes*, 905 F.2d at 1315 ("*FMC* is of course correct that at some point the commercial relationship becomes so attenuated or stale that *Montana*'s consensual relationship requirement would not be met"). It was reasonably foreseeable that A-1's employees might be involved in an accident while operating a gravel truck on the Reservation.

B. A-1's tortious conduct against a community member on the Reservation threatens the Tribe's economic security and political integrity

As a result of the accident with A-1's employee, Mrs. Fredericks was seriously injured and hospitalized for twenty-four days. Mrs. Fredericks is a long-time resident of the Reservation. She is the widow of a tribal member and the mother of five tribal members. She is very much a part of a tribal family and the Reservation community of Twin

Buttes.[20] A-1's conduct threatens the Tribe economically in terms of its provision of services to injured residents of the Reservation, especially when the injuries happened on the Reservation.

> The State where the employee lives and where he was injured has a large and considerable interest in the event. "The State where the tort occurs certainly has a concern in the problems following in the wake of the injury. The problems of medical care and of possible dependents are among these. . . . " The State where the employee lives has perhaps even a larger concern, for it is there that he is expected to return; and it is on his community that the impact of the injury is apt to be most keenly felt. Certainly when the injury occurs in the home State of the employee, the interest of that State is at least commensurate with the interest of the State in which an injury occurs involving a nonresident. . . .

Crider v. Zurich Ins. Co., 380 U.S. 39, 41-42 (1965). Here, the place where Mrs. Fredericks lives and where she was injured are the same – the Reservation.

A-1's conduct also threatens the Tribe's political integrity in terms of its sovereign right to determine the law of torts on the Reservation. " '[T]he advantages of a civilized society' . . . are assured by the existence of tribal government." *Merrion*, 455 U.S. at 137-138. "Tribal courts play a vital role in tribal self-government. . . . " *Iowa Mutual*, 480 U.S. at 14. A Tribe's court's role is critical particularly with respect to torts, an area of common law traditionally addressed through judicial fora. Judge Robert E. Keeton, *Part I: The Changing Lives of Professionals in Law*, 37 Ariz. L.

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[20] Gisela Fredericks is closely related to tribal members, a distinction that has not gone unrecognized in tribal law and federal law. *See Brendale*, 492 U.S. at 438 (tribal law equated "close relatives of enrolled members" with members for purposes of access to area of reservation closed to nonmembers); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 86 (1977) (Congress equated "persons closely affiliated with tribes" with tribal members for purposes of judgment fund distribution).

Rev. 419 (1995) ("on the subject matter of tort law, courts come to mind as historically the principal lawmakers, using the common law process").

> [I]t is beyond dispute that New Hampshire has a significant interest in redressing injuries that actually occur with the State. "A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort."

Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984) (citation omitted). The Tribe, no less than a state, has an essential interest in providing a court to hear tort claims arising within its territory and involving a member of its community.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

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